Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF FOR PETITIONER

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QUESTION PRESENTED

I. WHETHER THE FLORIDA BOARD OF ACCOUNTANCY'S BLANKET BAN ON AN ATTORNEY/CPA'S TRUTHFUL AND VERIFIABLE USE OF THE APPELLATIONS, "CPA" AND "CFP," ON BUSINESS CARDS, LETTERHEAD, AND TELEPHONE BOOK LISTINGS, VIOLATES THE ATTORNEY'S FIRST AMENDMENT RIGHT TO COMMERCIAL SPEECH.

PARTIES TO THE PROCEEDING

The following party was the Plaintiff below and is the Respondent before this Court:

State of Florida, Department of Professional Regulation, Board of Accountancy

The following party was the Defendant below and is the Petitioner before this Court:

Silvia S. Ibanez

References to the Record are:

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BRIEF FOR PETITIONER

Petitioner, Silvia S. Ibanez, respectfully prays that this Court reverse the Order and Judgment of the District Court of Appeal of Florida, First District, entered in this proceeding on June 9, 1993.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, dated July 28, 1993, denying Petitioner's Motion for Rehearing is reprinted at J.A. 198. The order of the Florida District Court of Appeal affirming, without opinion,

the Florida Board of Accountancy ("BOARD") order was issued on June 9, 1993. It is unreported and reprinted at J.A. 196. The decision which was affirmed by the District Court of Appeals is the Order of the Board, dated April 23, 1992, also unreported, and reprinted at J.A. 178.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, First District, was entered on June 9, 1993. Petitioner filed a Petition for Rehearing on June 23, 1993. On July 28, 1993 the First District Court of Appeal denied the Petition of Motion for Rehearing.

This Court granted certiorari on January 14, 1994. Jurisdiction of this court to review the case of petition for Certiorari rests on 28 U.S.C. Section 1257(3). Because the First District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the First District Court of Appeal is the highest state court in which a decision could be had. Fla. Const Art V Section 3(B)(3); Florida Supreme Court manual of internal operating procedures II Al.(A) 396 So.2d LXXXV; *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. First Amendment to the U.S. Constitution

II. Fourteenth Amendment to the U.S. Constitution

III. Chapter 473, Florida Statutes, in relevant part

IV. Chapter 21A, Florida Administrative Code ("F.A.C.")

The constitutional, statutory, and regulatory provisions are reprinted at J.A. 199-210.

STATEMENT OF THE CASE

A. Introduction

Petitioner is a practicing attorney, a member of the Florida Bar, and holds an active Florida CPA license in good standing. She is also a registered advisor with the Florida Division of Securities, as well as a certified financial planner ("CFP"). She became a CFP, in 1988, four years after she left the practice of public accounting.[1]

The CFP certification is conferred by the International Board of Standards and Practice of Certified Financial Planners ("IBCFP"), a national non-profit organization.

The language in Petitioner's CPA certificate specifically authorizes her to display her CPA credentials:

[1] Petitioner left the field of public accounting in 1984, at R. 415.

> "SILVIA SAFILLE IBANEZ . . . *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a certified public accountant.*" J.A. 3.

As an actively-licensed CPA, Petitioner is authorized to perform the attest function, known as auditing. She can also prepare financial statements or be associated with financial statements; perform tax return preparation services; perform estate, tax or financial planning services; perform all types of general accounting and bookkeeping activities; represent clients in IRS audits; perform management consulting services; provide EDP/computer consulting services; perform litigation consulting services (i.e. expert witness); value closely held businesses, among other activities.[2]

Petitioner currently engages in the practice of law, as a sole practitioner and provides legal services for her clients not provided by CPAs. As a tax attorney, part of her customary professional activities includes tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions, as well as financial and estate planning. In doing so, she utilizes both her legal education, training, and experience and her education, training and experience as a CPA. J.A. 152.

Both parties agree that many activities conducted by professionals and non-professionals, other than by CPAs, and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For

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[2] Pursuant to Sec. 473.302(4) Fl. St. and related regulations.

example, anyone can prepare a tax return.[3] Petitioner does not perform the attest function of a public accountant, i.e., she does not audit, which all parties agree is the only function which rests exclusively with CPAs.[4]

The Board concedes that except for Ibanez' use of the CPA and CFP credentials, she is a Florida licensed CPA in good standing. J.A. 150.

B. Disciplinary Complaint

The Board generated a complaint against Ibanez,[5] merely due to its receipt of an anonymously sent attorney yellow page listing, at J.A. 4, which had Petitioner's name circled. After her name, Petitioner had appended CPA, CFP. On July 30, 1991, the Board amended the complaint. The Hearing Officer allowed part of the amendment, pursuant to her Orders dated August 19, 1991 and August 22, 1991 at R. 79 and R. 103, respectively.

In essence, the Board's allegations, as amended, were:

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[3] Refer to Rule Challenge Order at J.A. 129.

[4] See Order of Hearing Officer at J.A. 153-154.

[5] On June 13, 1991, the Board charged her with an administrative complaint [at R. 1], based on her attorney yellow page listing and corresponding white page listing, alleging that she violated the Board's "holding out" rule, Rule 21A-20.012 F.A.C., and Subsection(g) of the Board's advertising rule, 21A-24.001 F.A.C., as well as related provisions in Sec. 473.323 Fl. St. The statute and regulations are reprinted at J.A. 200, and 206, respectively.

COUNT I: Petitioner is misleading the public by using the CPA credential in connection with her law firm.

COUNT II: Petitioner's use of the CFP credential in the attorney yellow pages and on her law practice business card constitutes false and misleading advertising of the practice of public accounting.

COUNT III: Petitioner's use of the CPA credential in the attorney yellow pages misleads the public into believing that she has complied with the Board's regulations and related Florida statutes.[6]

C. Administrative Hearing – Disciplinary

Petitioner's background and credentials were presented, as follows.[7]

- She holds a Bachelor's degree in Business Administration and a Master of Science degree in Accounting;
- She has held various licenses, including Florida securities license, securities principal license, insurance and annuities licenses, and other financial discipline licenses;

[6] These counts are summarized from the record, but are explained in depth by the Hearing Officer at J.A. 148 and again at J.A. 170-173. In turn, the rules and statutes cited therein have been reproduced at J.A. 200-210.

[7] In a prior proceeding, which has been admitted into the record of this disciplinary case, Petitioner gave testimony about her education, background and experience.

- She is a Certified Circuit Court Mediator, which is a certification conferred by the Florida Supreme Court;
- She worked during her college years, as a comptroller, part-time, and upon graduating, worked for CPA firms, off and on, until 1984; and
- She started a financial planning firm in 1985 and continued until 1988, when she started her law practice.[8]

The first "expert" called by the Board was Mr. Louis Dooner, the same expert used by the Board in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993).[9] Mr. Dooner[10] testified that Petitioner's use of the CPA designation of her attorney business card tells the public that she is offering to perform CPA services. He did not substantiate his conclusion with empirical studies or surveys. J.A. 25.

The Board's next witness, was Department of Professional Regulation ("DPR") employee, Elise Rice. Contrary to the Board's assertion in its Brief in Opposition to the Petition for Certiorari, at page 3, that Ms. Rice is a member of the public, in fact, Ms. Rice was an employee of DPR, the umbrella organization for the Board. Furthermore, her testimony was found to be "not persuasive" by

[8] See Hearing Transcript of Rule Challenge proceeding at R. 377 to R. 700.

[9] The Board did not present any Board members' testimony at the disciplinary hearing regarding the use of the credential, "CFP" or "CPA."

[10] Mr. Dooner testified that he had served as a Board member in the past. J.A. 19.

the hearing officer. J.A. 155. Ms. Rice clearly did not consider "CFP" as being connected to the "practice of public accounting," much less a specialty thereof. J.A. 155.

The Board then called Ms. Martha Willis, Executive Director of the Board, who could not explain why the Board deems CFP to be a specialty of public accounting. J.A. 39. Moreover, Ms. Willis conceded that: (1) the yellow pages attorney advertising that was a catalyst for the Board to generate an administrative complaint, was sent by an anonymous person (J.A. 45); (2) in her nine years[11] working at the Board, she. . . . "can't recall receiving a complaint from a member of the public that was not a CPA other than anonymous complaints" (J.A. 44); (3) starting in 1982, with the Board's first opinions[12] to a CPA-CFP, when the Board opined that CFP is a specialty designation, she does not know how the Board came to view CFP as a designation. J.A. 45-46.

Petitioner's case consisted of Petitioner's testimony[13], and that of Robert Goss, J.D., Executive Director

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[11] See J.A. at 39.

[12] The opinions of the Board are found at R. 235.

[13] This testimony consisted of testimony that she had given both at a related rule challenge hearing, as well as in the disciplinary hearing. The transcript of the rule challenge proceeding is found at R. 377-700; and the transcript of the disciplinary hearing is found at J.A. 7-115. The hearing officer issued rulings in both cases on January 15, 1992, and the respective Orders are found at J.A. 116 and J.A. 148 respectively.

of the IBCFP.[14] Petitioner's testimony is summarized below.

- Ibanez acknowledged that she is subject to Chapter 473 Fl. Stat. to the extent she is an active licensed CPA and Chapter 473 Fl. Stat. governs all active-licensed CPAs. J.A. 70.
- At the start of each engagement, she issues an "engagement letter" outlining the scope of her Firm's legal services. J.A. 154.
- Ibanez renders legal services to her clients consisting of legal representation before IRS; [R. 470]; interpretation of tax law and regulations; [R. 470] litigation expert witness regarding business matters, shareholder disputes, etc.; [R. 415] incorporation of businesses; [R. 496] and estate and financial planning. [R. 415]
- Ibanez' legal services are rendered to individuals, as well as corporate clients, but due to her type of practice, most are business people, or fairly sophisticated. [R. 441]
- She stated that all her representations to the public are that she is engaged in the practice of law. J.A. 68.
- When she is called to testify as in an expert witness in business cases and shareholder dispute cases, she discloses that she is a CPA, to describe her background and education, not as an expression of what profession she practices. [R. 426]

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[14] Effective February, 1994, the institution underwent a name change to "Certified Financial Planner Board of Standards."

- Ibanez represents to the public that her firm is a Law Firm, not a CPA firm; and as to herself, she identifies herself as a CPA. She considers that, individually she does "hold out", i.e. freely admits, she is a CPA, but only *for identification purposes* (emphasis supplied) J.A. 68.

Regarding Petitioner's CFP designation, the testimony of expert witness, Mr. Goss, clarified that financial planning is a separate discipline, rooted in the insurance and, to a lesser extent, the investment industries. Other critical information was provided: J.A. 53-66.

(1) CFP is a license that originated in academic environment; i.e., the College of Financial Planning;

(2) The IBCFP (a licensing, not a membership organization) has had exclusive jurisdiction over the use of the CFP mark since 1986;

(3) All CFPs are regulated by a Code of Ethics [Exhibit at R. 243, Volume II];

(4) The IBCFP's Code of Ethics specifically grants CFPs permission to use the "CFP" mark in combination with other professional credentials; i.e., CPA or educational designations, i.e., J.D., M.B.A., etc.;

(5) The CFP mark does *not* denote or imply a relationship to the practice of public accounting;

(6) In essence, the extensive examination of CFP candidates covers the areas of fundamentals of financial planning, risk management, investment planning, tax planning, estate planning, and fringe benefit and

retirement planning, which reflect the work of a certified financial planner and financial planning in general; this body of knowledge is tested through an examination process which is predicated on certain required educational components;[15]

(7) The regulation of financial planning as a body is carried on by the S.E.C. which requires that a financial planner should register as a registered investment adviser;

(8) Currently, there are more than 20,000 students engaged in financial planning courses which are administered by over 40 different higher learning or educational institutions. Some of these are provided at a graduate level, some are provided at an undergraduate level, and some are "certificate programs;"

(9) The students that enroll for any of the university-administered programs cannot become certified through the educational institution; it must seek certification through the IBCFP, which has proprietary control over "CFP", a registered trademark with the Federal Patent and Trademark Office in Washington, D.C. J.A. 66.

Finally, Mr. Goss verified that Petitioner is a currently licensed CFP. Mr. Goss explained that the only institution that may regulate or control the use of the CFP credential is the IBCFP and that the Florida Board of

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[15] See Exhibit 5 at R. 265 consisting of the IBCFP's general requirements.

Accountancy has never sought to enter into any arrangement with the IBCFP regarding the use of the CFP credential. J.A. 62. Furthermore, as a financial planning expert, he explained that any inference the financial planning or the CFP designation is a subdivision of public accounting is clearly erroneous. J.A. 63.

At the conclusion of the disciplinary hearing, Hearing Officer Davis, issued a "Recommended Order," reprinted at J.A. 147, recommending that all charges against Ibanez be dropped. J.A. 174.

D. Findings of Fact and Conclusion of Law Contained in Hearing Officer's Recommended Order.[16]

With few exceptions, the Board accepted most of the Hearing Officer's findings of facts:[17]

- Ibanez holds active, in good standing, CPA and CFP licenses. J.A. 150.
- The IBCFP is not affiliated with the Florida Board of Accountancy and has no proprietary interest over the CFP mark. J.A. 150.
- Ibanez is listed in the yellow pages under the heading "Attorneys"; she is also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." J.A. 156.

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[16] Reprinted at J.A. 147-177.

[17] Exceptions noted by the Board at J.A. 179: Paragraph 7 (second sentence), Paragraphs 13, 21, 23, Paragraph 24 (next to the last sentence, in part), and Paragraph 27.

- Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs." J.A. 152.
- CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that she holds an active CPA license is a valuable asset to that individual. J.A. 128.
- The only activity among public accounting activities that is "unique" to CPAs is the "attest" function. There is no evidence that Ibanez attests as a CPA in the course of her law practice, or that she personally performs audits. J.A. 153-154.
- Ibanez has clearly marked her office premises with all the indicia of a law office on signs posted outside the building as well as on the building itself. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. J.A. 154.
- Ibanez entered into legal contracts/letters with her clients setting forth the parameters of the legal services she has agreed to perform for the clients. J.A. 154.
- The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever misled members of the public purely by displaying their credentials in the manner Ibanez has done here. J.A. 157.
- Ibanez testified that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP. J.A. 154.

Accordingly, the Hearing Officer recommended a decision in Ibanez' favor because none of Ibanez' activities could be held to be subject to discipline for the violations charged in the instant amended administrative complaint. J.A. 173-174.

Alternatively, the Hearing Officer found that even if Ibanez had been found to be practicing public accounting, then she could not be guilty of any of the counts alleged against her based on the facts in the record.[18]

Finally, the Hearing Officer explained that the Board's advertising rule found in Rule 21A-24.001 F.A.C. clearly does not apply to Ibanez' situation, as regards Subsections (1)(a) through (f) and (h).[19] As to the rest of the advertising rule[20], the Hearing Officer noted that the

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[18] Refer to paragraphs 23, 24, 25, and 26 at J.A. 171-173.

[19] The entire rule is reprinted at J.A. 208-210.

[20] Summarized in relevant part, they are: Subsection (g) prohibits language that implies formal recognition in any aspect of public accountancy, including prohibition of the term "specialist", as well as any other self-designation; (i) prohibits any form of recognition by any entity other than the Board, which uses the terms "certified", "public", "auditor", or "auditing"; and (j) prohibits language that the CPA has received formal recognition as a specialist in any aspect of the practice of public accounting, unless there is a disclaimer stating that the recognizing agency is not affiliated or sanctioned by the state or federal government. Subsection (j) also requires that the disclaimer state the agency's requirements for recognition, including, but not limited to, educational, experience and testing.

Board's previous opinions treated the CFP as an unrecognized specialty of public accounting,[21] yet the Board had never promulgated any rule concerning CFP specifically. Paragraph 25 at J.A. 172.

The hearing officer found it significant that the Board's witness, Ms. Rice "did not infer that Ibanez' use of the abbreviation CFP held out a specialty of public accountancy." Paragraph 25 at J.A. 172.

E. Decision of the Board of Accountancy

1. Deliberation of the Board – Official Public Meeting

At the outset of the Board's meeting, convened to decide Ibanez' case, the Board's counsel distributed a "Proposed Order."[22] The proposed order, ultimately voted on, and adopted by the Board [See R. 178-195, is the decision under review by this Court.

Upon receiving the "Proposed Order," Board Member Dr. Calhoun stated:

> "I don't know about the rest of the Board members, but having read all this legal hoop-de-do, it's amazing to me that anybody could understand anything where they stood in any event." R. 1340-1341.

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[21] Refer to Paragraph 25 at J.A. 172.

[22] Under Florida Law, Section 286.011, Florida Statutes, public officials must conduct their deliberations in the 'sunshine' (open to the public).

2. Order of the Board

Upon rejecting the Hearing Officer's recommendation to dismiss all charges against Ibanez, see J.A. 179, the Board of Accountancy stated several conclusions:

1. Although there is a general exclusion from the Board's jurisdiction over certain CPAs, as an attorney, Petitioner does not come within the exclusion because she deals with the public. Footnote 3 at J.A. 182.

2. Petitioner's failure to license her law firm as a CPA firm is tantamount to being an "unlicensed"[23] CPA.

These conclusions, although unsupported by the record or by any reasoning, form the basis for the Board's finding that Petitioner's attorney advertising, which is concededly commercial speech, is false and misleading and must be banned. J.A. 189 and 194.

The Board found that the public in Florida could be misled by Petitioner's use of her CPA credential in the attorney yellow page listing. According to the Board, Ibanez' mere disclosure of the CPA and CFP credentials in her attorney yellow page listing conveys two messages to the public:

1) that she is subject to the technical standards for the practice of public accounting promulgated by the Board, and

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[23] Though the Board's order vaguely suggests that Petitioner is "unlicensed" because her law firm is unlicensed, this point is moot because the "unlicensed firm" allegation was withdrawn by the Board, prior to the disciplinary hearing. The hearing officer explains the pertinent details at Paragraph 22, J.A. 170.

2) that she will continue to comply, in the future, with the Board's regulations.[24]

As to the use of the CFP credential, the Board issued its order finding Ibanez guilty of deceptive advertising after conducting a constitutional analysis under the case of *Central Hudson Gas and Electric Corp. v. Public Comm'n of New York*, 447 U.S. 557 (1980). This analysis resulted in the Board concluding that:

> " . . . it is apparent that Respondent [Petitioner herein] has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy." J.A. 194.

(a) Re: CPA Credential

The Board's findings in regards to Petitioner's use of the CPA credential are:

> "that she is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C. by complying with those requirements. She does not license her firm as a CPA firm;

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[24] Implicitly, the Board speculated that, as an attorney, Ibanez will not always be in compliance with its regulations, in the future, and this hypothetical event is the cause for disciplining Ibanez now. The Board uses the example of contingency fees, which attorneys customarily accept, but are prohibited under Chapter 473, Fla. Stat. See Footnote 2 at J.A. 180.

> forego certain forms of remuneration denied to individuals for practicing public accountancy; or limit the ownership of her firm to other CPAs." J.A. 185.

The Record does not disclose anywhere that Ibanez has not acquiesced as to forms of remuneration or as to the ownership of her law firm; indeed, there was no evidence in the Record as to these two actions that the Board is apparently imputing to Ibanez. As to Ibanez' firm, which all parties agreed is a law firm, there is no evidence in the record as to why she should license the law firm as a CPA firm.

Thus, the Board's finding that Ibanez has "failed to acquiesce" with the requirements of Chapter 473, is not supported by the record, insofar as the Board does not articulate in what manner she has failed to do so. Specifically, regarding the CPA credential, there is no valid rule of the Board which would prohibit her truthful disclosure thereof.[25]

The Board places undue emphasis on Ibanez' accounting skills, at J.A. 184, attributing them strictly to her work experience while working for a CPA firm, despite the fact that she has earned undergraduate and graduate degrees in accounting.

Additionally, the Board's findings are couched in language that attempts to portray Ibanez in a negative light although the act referred to is perfectly legal and professionally appropriate. For example, at Footnote 7 at

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[25] "Holding out" rule, Rule 21A-20.012 F.A.C., was invalidated effective May 12, 1992, reprinted at J.A. 206.

J.A. 185, the Board refers to Ibanez' use of the CPA credential as "trading on the fact of her licensure as a CPA." Later on at J.A. 189, the Board continues that "use of the title CPA in her advertisements . . . is an inducement to contact respondent (Petitioner) and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy."

(b) Re: CFP Credential

Regarding the *CFP credential*, the Board states in its Order that the use of the term "CFP", by a CPA licensee, is considered by the Board as inherently misleading. Yet, based on the record, no one has been misled by Ibanez. J.A. 157. The record is also devoid of any empirical data or studies to support this factual conclusion. J.A. 157.

The Order of the Board does not refute or rebut the testimony of the financial planning expert regarding the CFP credential. Finding that CFP is considered by the Board as a specialty designation, the Board applied the *Central Hudson* test to the Board's advertising rule[26]. The Board's legal conclusion consisted of application of the *Central Hudson* test to the Board's ban on CFP. At the outset, the Board found that Ibanez' use of CFP is "inherently misleading." Order at J.A. 193. However, the Order does not explain the Board's rationale on how a

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[26] Rule 21A-24.001 F.A.C., in all parts, but specifically due to the prohibition of the use of the "certified", in Subsection (i) of the Rule at J.A. 208-209.

complete ban of the use of CFP advances a substantial government interest in a reasonable manner.

The Board's Order was officially filed on May 12, 1992, and Petitioner filed a timely appeal thereof with the District Court of Appeal, First District, State of Florida.

F. Decision of the District Court of Appeal, First District, State of Florida

The Florida District Court of Appeal, First District, issued an Order of Affirmance on June 9, 1993. Petitioner timely filed a Petition for Rehearing on June 23, 1993, which was denied, giving rise to the filing of this action for review before the Court.

SUMMARY OF ARGUMENT

The sole issue for determination by this Court is whether the Florida Board of Accountancy's blanket ban on attorney/CPA's truthful and verifiable use of the appellations , "CPA" and "CFP", on her law firm's business card, letterhead, and telephone book listings, violates the attorney's First Amendment right to commercial speech.

The Florida Board of Accountancy's ("BOARD") complaint against Ibanez was initiated upon the Board's receipt of an attorney/yellow pages listing, sent in anonymously, which included Petitioner's name. There was no letter, note or hint of a "complaint" other than a circle around her name. As an attorney whose practice includes corporate and tax law, Petitioner advertises in

the attorney yellow pages that she is an attorney, who also holds CPA and CFP licenses. This valuable, biographical information is conveyed to the public in a discrete and professional manner, by merely appending the credentials CPA and CFP after her name. The totality of the activity that the Board found objectionable, and gave rise to this case, is Ibanez' attorney yellow page listing, at J.A. 4; her business card, at J.A. 5; and her law firms letterhead, at J.A. 6.[27] Ibanez' identification activities are truthful and, as such, cannot be banned by the State.

In its Final Order, the Board punishes Ibanez for her truthful identification of credentials under the guise of regulation of CPA activities. To accomplish this end, the Board hypothesizes that, during the course of her law practice, Ibanez may run afoul of the Board's rules (e.g. the Board's rule against accepting contingency fees, etc.) Based on this, and other irrelevant conjectures, the Board concludes that Petitioner misled the public when she disclosed to her potential and actual law practice clients that she is a "CPA", because she does so in relationship to her law firm which is not a licensed CPA firm. Furthermore, the Board finds that the credential "CFP", which Ibanez discloses in her attorney yellow page listing, is "Inherently misleading." This unfounded conclusion is based on the Board's assertion that financial planning is a specialty of public accounting.

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[27] The law firm letterhead only makes reference to Ibanez' membership in professional organizations, e.g. "Member of AICPA "(American Institute of Certified Public Accountants).

The Final Order of the Board interprets this Court's holding in *Central Hudson*[28], to justify a total ban on Ibanez's truthful disclosure of licenses she lawfully holds. Indeed, in the case of "CPA", the certificate conferred upon Ibanez by the Board clearly authorizes her to append "CPA", the certificate conferred upon Ibanez by the Board authorizes her to append "CPA" after her name. Certificate at J.A. 3. In effect, the Board has subverted the principles articulated by this Court in *Central Hudson*, and its progeny, e.g. *Peel*[29] *and Fane*[30], which protect Ibanez' right to First Amendment commercial expression of biographical data and educational attainments.

In finding that Petitioner is misleading the public through her truthful disclosures, the Board did not point to a single instance where Ibanez has misled anyone. Instead, the Board's Order rested entirely on the testimony of the Board's Executive Director, an employee of the Department of Professional Regulation and Louis

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[28] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of N.Y.*, 447 U.S. 557 (1980) [case in which the Court formulated a four-part analysis to determine if commercial speech may be restricted by the State. To be deserving of Constitutional protection, 1) the speech must concern lawful activity and not be misleading; if so, then restrictions may be imposed if: 2) there is a substantial government interest; 3) the restriction directly advances the asserted government interest; and 4) the restriction is not more restrictive than necessary.]

[29] *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

[30] *Edenfield v. Fane*, 507 U.S. ___, 113 S.Ct. 1792 (1993).

Dooner, a former member of the Board and "expert witness." Nevertheless, the Board concluded that the public, in general, was misled by the mere act of seeing CPA and CFP appended in Ibanez' name.

Both parties agree that the appending of the CPA and CFP credentials, after Ibanez' individual name, constitutes commercial speech. Commercial speech which consists of merely listing educational attainments, degrees, and/or licenses, deserves substantial First Amendment protection.

As to the CPA credential, this Court has ruled that a mark of recognition which is truthful, and verifiable, provides consumers with valuable information. Thus, it cannot be inherently misleading. Indeed, Ibanez' use of CPA is not even potentially misleading in any context, but especially not in the context that consumers may, and can, infer that CPA is a State-conferred certification. There is simply no empirical evidence to support the conclusion that the public can be misled when disclosing State licensure status.

Ibanez' use of CFP is also constitutionally protected, as commercial speech, because attainments of one's educational attainments and licenses cannot be banned. *Peel, supra.*

Thus, Petitioner asks this Court to reaffirm that commercial speech, consisting of truthful, biographical, and objective facts (i.e. verifiable), cannot be banned without violating Ibanez' First Amendment rights.

ARGUMENT

I. PROHIBITIONS OF COMMERCIAL SPEECH BY PROFESSIONALS ABOUT THEIR QUALIFICATIONS, LICENSES, AND EDUCATIONAL ATTAINMENTS DESERVE SUBSTANTIAL FIRST AMENDMENT PROTECTION AND THE BAN THEREOF DOES NOT MATERIALLY ADVANCE A SUBSTANTIAL STATE INTEREST.

A. Importance of Commercial Speech, as Reaffirmed in *Peel, Fane* and *City of Cincinnati.*

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. *See Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). This Court has also recognized First Amendment protection for speech concerning the ability of professionals rendering services. For example, in *Re R.M.J.,* 455 U.S. 191 (1982), this Court unanimously struck down certain advertising restrictions promulgated by the Missouri Bar including bans on describing areas of practice, listing Courts and states in which the lawyer had been admitted to practice, and the wide-scale mailing of announcement cards.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91 (1990), this Court overturned the public censure of an attorney by the Illinois Supreme Court where the attorney had used the letterhead claiming certification as a trial specialist by the National Board of Trial Advocacy. The court ruled that the State could not completely ban disclosure of certification conferred by a private professional organization.

Recently, in *Edenfield v. Fane,* 507 U.S.___, 123 L.Ed.2d 543, 113 S. Ct. 1792 (1993), these protections were extended to certified public accountants. Under the First Amendment, as confirmed by prior decisions of this Court, Petitioner is entitled to advertise and communicate truthful, non-deceptive information. These are types of commercial expression to which the protections of the First Amendment apply and increases the ability of consumers to make informed choices about matters important to them, *Edenfield v. Fane, supra.*

Similarly, *Cincinnati v. Discovery Network,* 507 U.S. ___, 123 L.Ed.2d 99, 111 (1993), reaffirmed the holding in *Bigelow v. Virginia,* 421 U.S. 809, at 822, that "purely factual matter of public interest may claim protection." Furthermore, the Court reminds us not to "understimate the value of commercial speech", *Cincinnati,* at 109.

B. Because Commercial Speech Makes An Important Contribution To Public Welfare, Government Must Make A Substantial Showing To Justify Regulation.

This Court's general approach for determining the constitutionality of restrictions on commercial speech, including the "commercial speech of attorneys," is set forth in *Central Hudson Gas and Electric Corp. v. Public Comm'n,* 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity." If the communication meets that threshold test, it may then be restricted only if (a) the government asserts a substantial interest to be achieved by the restrictions, (b) the

restrictions directly advance the government's asserted interest, and (c) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Central Hudson* at 564 and 566.

In *Fane, supra,* at 553, the Court emphasized that once the threshold test is met, i.e., the speech is not misleading and related to a lawful activity, the burden is on the State to justify the restrictions. If the justification advanced by the State is imprecise or not the actual State interest, it is improper for the Court to supplant or interpolate where the State's true interest lies. *Fane, supra,* at 554.

II. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING IBANEZ BECAUSE SHE PLACED THE CPA DESIGNATION IN HER ATTORNEY LISTING IN THE YELLOW PAGES, ON HER LAW OFFICE BUSINESS CARD AND ON HER LETTERHEAD

A. Ibanez' Use of the CPA Designation is Truthful and Not Misleading.

In *Peel, supra,* the attorney stated on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. 496 U.S. at 6. This Court observed that the facts stated on the letterhead were true and verifiable. Additionally, this Court noted that there was no contention that any potential client or other person was misled or deceived by Peel's stationery. 496 U.S. at 100.

The Board of Accountancy acknowledged that Petitioner was indeed a licensed CPA. Furthermore, the Board acknowledged that Petitioner's CPA certificate

states that she is entitled to append the letters CPA after her name to evidence registration by the Board of Accountancy as a certified public accountant.[31] Therefore, Petitioner's advertisement that she is a CPA is true and verifiable. As such, it is not subject to blanket suppression by the Board.

B. Petitioner's Advertisement That She Is A CPA Is not Potentially Misleading.

In this Court's decision in *Re R.M.J.,* 455 U.S. 191 (1982), the Court stated that although truthful advertising is entitled to the protections of the First Amendment,

> " . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." 455 U.S. at 203.

In this case, the Board of Accountancy found that Petitioner's use of the appellation "CPA" was inherently misleading.[32] In its Brief in Opposition to Petitioner's Petition for Certiorari, the Board relying on *Friedman v. Rogers,* 440 U.S. 1 (1929) [case declaring that the use of

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[31] In its Final Order, at J.A. 179, the Board accepted this, among other findings of fact, of the administrative hearing officer's Recommended Order.

[32] Because potential clients "would clearly see respondent's use of the titles "CPA" in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy." Board Opinion, J.A. 189.

trade names can be misleading because trade names have no intrinsic meaning] seeks the Court's application thereof to Ibanez' case. However, the CPA mark is clearly meaningful and denotes State Licensure status as a licensed CPA. Consequently, a case dealing with trade names, i.e. that have "no intrinsic meaning," 440 U.S. at 12, can have no applicability to Ibanez' listings of her CPA professional credential after her name because her credentials do have intrinsic meaning.

Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy. There is plainly no risk of misleading the public as a result of Petitioner's use of the CPA appellation because the appellation accurately reflects her licensure as a CPA. Like every licensed CPA in Florida, Ibanez is obviously regulated by the Board. It must be emphasized that this case arose out of a disciplinary proceeding which resulted in Petitioner being reprimanded for disclosing to the public, information, that she was authorized to disclose by the Board itself.[33]

The Board's vague concern regarding the fact that Petitioner's law practice professional association is not licensed as a public accounting firm has no bearing whatsoever on the fact that Petitioner is a certified public accountant entitled to advertise that fact. Similarly, the Board's abstract concern that some member of the public might think that Ibanez' law firm is a licensed public accounting firm does not render Petitioner's use of the appellation "CPA" misleading.

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[33] Refer to Ibanez' Board-conferred CPA certificate at J.A. 3.

The Board's "misleading" theory rests on speculation, and is apparently grounded on the rationale that Ibanez, a practicing attorney, in good standing as a Florida licensed CPA, may one day engage in illegal activity see Board's example: accepting contingent fees on a court case, at J.A. 180. This supposition ignores the fact that Ibanez has not engaged in such activity which puts the Board's Order in the category of punishing Ibanez for anticipated future conduct.

Though the Board insists that Petitioner's practice of law may, in the future, violate CPA rules, this supposition does not invalidate Ibanez' legally authorized use of CPA.

C. The Board Has No Substantial Interest In Totally Suppressing Petitioner's Disclosure Of Her CPA Credential.

The state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Re R.M.J.*, 455 U.S. at 203, citing *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 563, 564 (1980). Although the Board of Accountancy asserts that it is obvious that the regulation of the practice of public accountancy is a valid governmental interest (Board's Order at J.A. 186), it is the blanket ban, not the regulation of public accounting in the abstract, which must pass muster on this second prong of the test. Here, the Board has failed to identify any substantial interest in a rule that prohibits a CPA from advertising the fact that she is a CPA. In *Re R.M.J.*, this Court found that the Missouri advisory committee similarly failed to identify

any substantial interest in a rule that totally prohibits a lawyer from identifying the jurisdiction in which he is licensed to practice. The Court stated that such information was not misleading on its face but was instead, factual and highly relevant information. 455 U.S. at 205.

Applying *Central Hudson* to this case, it is apparent the Florida Board of Accountancy has failed to satisfy the second prong, because no substantial government interest has been proven. At this point, the Court's analysis may cease because prongs three and four are contingent on there being a "substantial government interest" asserted. Such an interest is lacking here. However, the analysis will continue assuming, arguendo, that this Court were to find there is a substantial government interest.

D. The Board's Total Ban Of Petitioner's Advertisements Does Not Advance The State's Interest.

The third prong of the *Central Hudson* test is whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566.[34] Elaborating

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[34] Recently, the Court analyzed this third *Central Hudson* factor, in *United States v. Edge Broadcasting*, 509 U.S. ___, 125 L.Ed 2d 345, 113 S. Ct. ___, (1993), a non-attorney advertising case which dealt with a Federal lottery advertising restriction, as applied to prohibit one state's radio station broadcast of legal lottery activities into another state. Therein, the Court agreed that Congress had identified a legitimate government interest in formulating a policy that would balance the interests of lottery states and non-lottery states. Thus, Congress' support of non-lottery states (North Carolina), "by forbidding stations in such a

on the interest to regulate public accounting, the Board claims that such interest is advanced by ensuring:

> " . . . that only an individual who meets certain standards is permitted to call oneself (herself) a CPA", Order at J.A. 187.

In support, the Board cites the case of *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), which, in essence, prohibits unlicensed individuals from calling themselves licensed.[35] Yet, the Board's position, while in the abstract, has no application to Ibanez. Ibanez is licensed as a CPA. The Board's vague reference to Ibanez' law firm being

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state from airing lottery advertising . . . ", at 125 L. Ed. 2d 356, was found to directly advance the government interest. That case must be distinguished from the instant case, because the asserted government interest of the Board, in ensuring that the general public is not misled, cannot be directly advanced by absolutely prohibiting Ibanez' truthful, verifiable speech.

[35] The Board's reliance on "title acts" which prohibit unlicensed persons from using professional titles is misapplied. *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer"). Similarly, in the Board's Order and in its Brief in Opposition to Petitioner's Petition for Certiorari, the Board cites the lower court cases of *Gandee v. Glaser*, 785 F.Supp. 684 (S.D. Ohio 1992) and *United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 239 (1991). *Gandee* also deals with prohibited conduct of unlicensed persons. *DeFusco* upheld the right of the United States to prosecute a person for distributing material that misled the people into believing that they won a contest. Neither *Gandee* nor *DeFusco* would serve to deny or negate Ibanez' right to list her professional credentials truthfully.

unlicensed is tantamount to suggesting that Ibanez, the individual, is unlicensed. Furthermore, the Board's references to her law firm should be disregarded as similarly irrelevant, considering that the Board did not charge Ibanez with practicing in an unlicensed CPA firm.[36] The only charge before the Court is the truthful and verifiable use of Ibanez' credentials after her individual name.

Most recently in the *Fane* case, this Court stated the burden of restricting commercial speech is not satisfied by –

> "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Fane*, at 555.

In this case, the Board did not, in its Order, identify a single individual who had been misled by Petitioner's advertisement of the appellation "CPA." The hearing officer noted that the Board failed to prove that any consumer in Florida had been misled by Petitioner's advertisements. The Board's primary witness was Louis Dooner. Mr. Dooner's conclusionary statement was nothing more than "conjecture" as to the effect of Petitioner's use of CPA designation on the public. In *Fane, supra*, at 556, this Court rejected Mr. Dooner's testimony because it

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[36] Refer to Hearing Officer's Recommended Order (J.A. 170) as to the first count of the Amended Complaint and her Orders dated August 19, 1991 and August 22, 1991 at R. 79 and R. 103, respectively, which clarifies that the Board voluntarily withdrew a charge to such effect.

was based on conjecture. Mr. Dooner's testimony in this case is similarly objectionable.[37] Ms. Martha Willis, Executive Director of the Board, could also not identify any party who had been misled by Petitioner. The Board's third witness, Elise Rice, Professional Regulation ("DPR") employee testified that she did not make a connection between CFP and the practice of public accounting. Significantly, the Board failed to identify a single study or any empirical data to substantiate its abstract concerns.

In light of the foregoing, the conclusion that Petitioner misled anyone was mere "speculation or conjecture" which this Court in *Fane* held to be insufficient to satisfy the burden of justifying a restriction on commercial speech. Accordingly, the third prong of the *Central Hudson* test was not satisfied by the Board of Accountancy, because the Board's asserted interest – ensuring the public is not misled – is not served by banning Petitioner's truthful disclosures of the CPA state licensure appellation.

E. The Board's Order Was More Restrictive Than Necessary

The last prong of the *Central Hudson* test is whether the State's restrictions are more restrictive than necessary to achieve the state's interest. *Central Hudson*, 447 U.S. at 566. As the court explained in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), while

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[37] It is significant that the Board would use the same "expert" to suppress the First Amendment rights of attorney/CPAs, as it used to suppress First Amendment rights of CPAs.

this last prong of the *Central Hudson* test does not require the state to use the least restrictive means to achieve its interest, it does require the state to employ "a means narrowly tailored to achieve the desired objective." 492 U.S. at 469, 480. The Board found that because Petitioner's use of the appellation "CPA" was inherently misleading that the "Board's position that a CPA must comply with the statutes and rules, when trading upon the fact of licensure as a CPA, constitutes a "reasonable fit" for constitutional purposes." J.A. at 187.

This conclusion is directly contrary to this Court's ruling in *Fane,* which held that where the prohibitions do not serve the purposes of the state in a direct and material manner, the restriction cannot be, by definition, a reasonable time, place, or manner restriction. *Fane,* 507 U.S. at 557. Accordingly, because the Board's restriction on Petitioner's speech lacks a substantial relationship to the governmental interested asserted,[38] it is not necessary for this Court to consider the fourth prong of the *Central Hudson* test.

Clearly, the order of the Board demonstrates that no consideration whatsoever was given to employing

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[38] In the recent case of *Cincinnati,* at 123 L.Ed.2d 99, 115, (1993) the Court could find no basis for distinguishing between "newspapers" and "commercial handbills", and the distinction bore no relationship to the interest asserted, consequently the Court held that "the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox.*" Similarly, in the instant case, the Board cannot justify a distinction between CPAs, as opposed to CPA/attorneys, as regards disclosure of their rightfully earned CPA credential.

"means narrowly tailored to achieve the desired objective", such as a disclaimer, other than a total suppression of Petitioner's advertising the CPA mark. The final prong of the *Central Hudson* test was not satisfied by the Board of Accountancy because the ban imposed by the Board cannot be held to advance the Board's interest.

Based on the above, it is evident that the Board cannot meet the *Central Hudson* tests. Thus, Ibanez' use of the CPA credential is commercial speech deserving of full protection under the First Amendment, as applied to the States under the Fourteenth Amendment.

III. THE FIRST AMENDMENT PROHIBITS THE BOARD FROM PUNISHING IBANEZ BECAUSE SHE APPENDS THE CFP DESIGNATION TO HER NAME IN THE ATTORNEY LISTING IN THE YELLOW PAGES, AND ON HER LAW OFFICE BUSINESS CARD AND LETTERHEAD.

A. Ibanez' Earned CFP Credential Is Truthful, Verifiable, and Not Misleading

The Board conducted no in-depth analysis under *Central Hudson* with respect to Petitioner's use of the appellation "CFP." Instead, the Board concluded that Petitioner's use of the designation "CFP" was inherently deceptive and misleading advertising by implying a specialty of public accountancy not recognized by the Board of Accountancy.

The Court's decision in *Peel, supra,* provides the Court with a comparable scenario, due to attorney Peel's truthful disclosure of credentials conferred by a private

organization. As in *Peel*, the IBCFP is a bona fide institution, which through its Federal trademark, "CFP", is the only entity that can use the word "certify" in conjuncture with "financial planning." The IBCFP[39] imposes rigorous education and testing requirements, and requires compliance with rules of ethics.

Nothing in the record supports the Board's contention that CFP implies a specialty of public accounting. Instead it is a discrete discipline. Federal law also contradicts the Board's notion, for it is well established by the Securities and Exchange Commission ("SEC") that anyone who "holds out" to be offering financial planning services is regulated by the Investment Advisers Act of 1940 ("Advisers Act").[40]

The SEC's interpretive release explains that, in addition to the Federal layer of regulation, financial planning, in more than 40 states, is regulated under state registered investment adviser laws. In Florida, Chapter 517, Florida Statutes, is the State counterpart to the Federal investment adviser laws. Although in Florida, attorneys and CPAs are exempt from registering as an "investment adviser when the professional renders such services in connection with the regular practice of his profession . . . "[41], Ibanez is registered not only with the SEC, but also under Chapter 517, Florida Statutes.

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[39] As of February 1, 1994, the IBCFP has changed its name to *"Certified Financial Planner Board of Standards."*

[40] Refer to Investment Advisers Act Interpretive Release #IA-1092 which amends Part 276, Chapter 11 of Title 17 of the Code of Federal Regulations.

[41] Refer to Sec. 517.021(10)(b)1 Fl. St.

Furthermore, in light of the expert witness testimony of Mr. Goss, there can be no doubt that Ibanez' use of CFP is truthful because she holds a CFP license in good standing. Thus, CFP cannot be deemed "inherently misleading" when appended after Ibanez' name, due to its truthful and verifiable nature. As in *Peel, supra*, CFP cannot be absolutely banned under the First Amendment.

B. Ibanez' Use Of *CFP* Is Not Potentially Misleading

Justice Marshall, in *Peel, supra*, at 113, explained the various meanings of the word "certified", specifically:

> "[A] document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination or has attained professional standing in a given field and may officially practice or hold a position in that field." Webster's Third New World International Dictionary 367 (1986 ed.) See also ibid. (defining "certify" as, inter alia, "license").

In *Peel*, the NBTA was a membership entity. In the context of "CFP", the certification is more akin to *educational attainment*, for financial planning is a separate field of discipline. Indeed, the IBCFP has sponsored financial planning programs in more than 44 colleges and universities. The IBCFP is a non-profit organization whose existence is predicated on the credentialing of CFPs, who meet the extensive education and testing requirements imposed by this regulating body.

In *Peel*, the NBTA was considered, by Justice Marshall and other members of the Court, as potentially misleading because the NBTA is not a "commonly recognized organization", as regards the public in general, at 496 U.S. 114. However, the general public has a need for attorneys with financial planning expertise. Many colleges and universities have instituted curricula in financial planning, in coordination with the IBCFP.[42] Thus, the public's need is served by Ibanez' advertising of her CFP designation, conferred by a recognized organization.

Neither Mr. Dooner, nor the Board's executive director, could point to any statistics or studies which link the use of 'CFP', by practicing attorneys, to any public misconception. Neither is there any empirical data to that effect regarding the combined use of CPA, CFP, by a practicing attorney.

Based on the record, including the fact that financial planning is a separate discipline, related under federal and state registered investment adviser statutes, this Court can readily conclude that it is not a specialty of public accounting. Although *Peel* supports Ibanez' position, that case concerned the more troublesome query of specialty which possibly implies a "claim as to the quality of services", *Peel*, 496 U.S. at 114. But that is not the case here.

Petitioner's use of her earned licensure marks, makes no "claim of quality" nor does her use of the CFP credential "propose a commercial transaction", as was the case in *Peel*. Ibanez appends her CFP and CPA credentials

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[42] Refer to Mr. Goss' testimony at J.A. 61-62.

after her name, in a highly professional, discreet and straightforward manner in her attorney yellow page listing and on her law practice business cards.[43] Thus, the speech in question here is purely "passive" speech, which communicates a truthful, verifiable fact.

Where the certification in question denotes qualification in another discipline, which is a relevant, valuable disclosure to attorney Ibanez' clients, the Board cannot impose any restrictions on the use of the CFP designation. If restrictions are permitted, it should be less than an absolute ban. *Peel* at 116.

Even if Ibanez' use of CFP was potentially misleading, in the abstract, then at best the Board could have proposed restrictions so that the CFP information "may be presented in a way that is not deceptive." *Re R.M.J.*, 455 U.S. at 203.

C. The Board Has Not Demonstrated a Substantial Government Interest in Prohibiting the Use of "CFP"

Significantly, the Board's Order is devoid of any government rationale as to what potential harm the Board is trying to prevent. Nor does it explain how an absolute ban advances such interest. Likewise, the transcript of the Board's official meeting, at R. 1305-1359, which decided the Ibanez disciplinary case, is virtually silent as to the CFP issue. This lack of any coherent justification for the total ban is even more intolerable when it is considered

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[43] As to her letterhead, at J.A. 6, the CFP credential is only inferred from the reference to the IBCFP.

that the Board has not banned the use of the CFP term in a uniform manner.[44]

As affirmed by this Court in *Fane*, it is not the Court's function to seek out the government's asserted interest, or to construe it, when it is articulated somewhat vaguely. On the basis of the record in this case, the Board has failed to articulate a government interest, which can be considered either substantial, or valid, to justify its total ban on Ibanez' disclosure of the designation – CFP.

D. The Board's Total Ban of CFP Does Not Advance the Board's Interest, and Is Not a Reasonable Fit

The potential harm, i.e. the notion that the public could be misled by the disclosure of CFP after Ibanez' name, is articulated by the Board at J.A. 194:

> " . . . in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, [it] has been determined by the Board to be false, deceptive and misleading advertising by implying a specialty of public accounting, not recognized by the Board of Accountancy."

Prior case law makes clear that a total ban is not a reasonable means to advance such an interest, unless the ban is narrowly tailored to vindicate a substantial state

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[44] The Board granted a CPA/internal auditor of a state government agency, the right to use "CFP" along with his "CPA" designation (see Board opinion to C.M. Williams, dated September 21, 1987, as ratified by the Board on September 30, 1987, at R.372).

interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The Court has consistently found in favor of disclosure, *Bates v. State Bar of Arizona*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"), and that means that the government may fashion a restriction that provides more information to consumers, but it cannot outlaw all use of CFP. In short, the Court should be guided by the principle it established in *Shapero*,[45] i.e., that consumers of information can best be protected by imposing restrictions that "distinguish [ ] the truthful from the false, the helpful from the false, the helpful from the misleading, and the harmless from the harmful."

The public interest regarding lawyer advertising, is best served by facilitating consumers' access to legal services, which, in turn, would better serve the administration of justice. *Re R.M.J.*, 455 U.S. at 199, 200. The Court reaffirmed this view in *Peel*, 496 U.S. 91, 111, n. 18, when the Court noted that a principal reason why consumers do not consult lawyers is "because they do not know how to find a lawyer able to assist them with their particular problems." (Citing Federal Trade Commission, Staff Report on *Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (1984)).

Accordingly, the Board's ban on the use of CFP cannot withstand the *Central Hudson* analysis, nor does it serve the public interest. Therefore, Ibanez' use of CFP

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[45] *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 478 (1988).

deserves full protection under the First Amendment, as applied to the States under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment and order of the First District Court of Appeal of the State of Florida should be reversed.

Respectfully submitted,

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